No. 15885.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES H. RUTHERFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING BY APPELLANT AND REQUEST FOR HEARING EN BANC.

MURRAY M. CHOTINER and
RUSSELL E. PARSONS,

600 Fox Wilshire Theatre Bldg.,
202 South Hamilton Drive,
Beverly Hills, California,

Attorneys for Appellant Charles H. Rutherford.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

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Statement of Case.

The above-entitled Court, on January 28, 1959, affirmed the trial court's conviction of your appellant of wilfully and knowingly failing to register and to pay the occupational tax required by Sections 4411 and 4412 of the Internal Revenue Code of 1954, in violation of Section 7203, Title 26, United States Code.

Grounds for Rehearing.

A rehearing should be granted herein and the decision vacated for

I.

The Decision Is Contrary to Law.

A. The Motion to Suppress Evidence Should Have Been Granted.

B. The Prosecution Was Bound by Its Evidence of Defendant's Conversation.

II.

The Evidence Does Not Support the Conviction.

A. The Prosecution Did Not Establish That Defendant Was Required to Register and Pay a Wagering Occupational Tax.

B. There Was No Showing of "Wilfully and Knowingly."

C. Venue Was Not Established.

ARGUMENT.

I.

The Decision Is Contrary to Law.

A. The Motion to Suppress Evidence Should Have Been Granted.

The Court, in commenting on the authorities cited by appellant in support of his contention that the search warrant was improperly issued and the motion to suppress evidence should have been granted, cites the case of *Brinegar v. United States,* 338 U. S. 160, 93 L. Ed. 1879, on page 8 of the Court's opinion.

The Court states that the *Brinegar* case explains or disapproves former cases relied upon by appellant.

However, with all due deference to the Court, it must be pointed out that there is no conflict between the law of the *Brinegar* case and the authorities cited by appellant.

The facts make the decisions; and the facts in the *Brinegar* case show unmistakably that the officers had a right to make the arrest and make the search as incidental to the arrest.

The facts in the *Brinegar* case were:

1. The officers had previously arrested the defendant five months before.

2. They had seen him transporting liquor on two previous occasions.

3. The automobile was heavily loaded.

4. When the officers took out after the defendant he picked up speed.

5. One case of liquor was visible on the seat of the defendant's automobile from the outside.

6. The defendant admitted having twelve cases of liquor.

7. The automobile was searched after all of the foregoing events.

These facts were noted on pages 162-163 of the *Brinegar* case.

The Court in the *Brinegar* case held that the knowledge of the officers that the defendant was engaged in an unlawful business was not based wholly or largely on surmise and hearsay. The facts were derived from personal observation and were sufficient. (P. 172 of the *Brinegar* case.)

In short, the guilt of the defendant in the *Brinegar* case was clear before a search was made.

The facts in the instant case, on the other hand, show that the search warrant was issued on the basis of surmise and hearsay, without personal knowledge that the appellant was engaging in an unlawful business. Instances of this surmise, hearsay and remoteness are:

1. Deputy Sheriff Fowler observed and heard one of his confidential informants dial a certain telephone number and place a bet on a horse race; the address of the place to which was assigned the number dialed by the informant was one where Howard Lee Cupp was observed leaving.

(This address was not connected in any way with the defendant.)

2. Deputy Sheriff Fowler cited the records of the Los Angeles County Sheriff's Office pertaining to previous convictions of the defendant. These were gambling in 1938, 1949 and 1955; and bookmaking in 1946 and another occasion, the date not being given.

3. Deputy Sheriff Fowler stated that the appellant has a reputation as a bookmaker.

4. Deputy Sheriff Fowler stated the appellant is the son of Mark Rutherford, a known notorious bookmaker, and the appellant has taken over his father's business.

5. Deputy Sheriff Bublitz stated that the appellant is a notorious bookmaker.

6. Deputy Sheriff Bublitz stated that Monica Kissell has the reputation as a girl-friend of the appellant.

7. Deputy Sheriff Bublitz stated that Rutherford's *modus operandi* consists of operating a "relay-back office" operation in which the better never has contact with the actual bookie.

8. Deputy Sheriff Bublitz stated that Earl Maltby said that he was accepting wagers on behalf of a person known to him only as "C. H."

9. Deputy Sheriff Bublitz stated that the appellant is a notorious bookmaker.

10. Agent Katayama stated he was advised the appellant was conducting large-scale bookmaking activities. [Tr. of Rec., pp. 26-33.]

These affidavits in support of the search warrant demonstrate that the material does not comply with the judicial rulings on this subject.

No search warrant shall issue except upon probable cause supported by oath or affirmation.

United States Constitution, Fourth Amendment.

Probable cause means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.

Stacey v. Emery, 97 U. S. 642, 24 L. Ed. 1035.

Where an affidavit in support of the issuance of a search warrant does not set out facts showing the required probable cause, the motion to suppress evidence seized as a result of the search warrant must be granted.

United States v. Lassoff, 147 Fed. Supp. 944.

The affidavit for the search warrant must state facts known to be true from observation. Courts should not validate writs issued on sworn declaration which literally comply with the terms of the Federal Statute on information and belief or conclusions, instead of positively alleging the material facts.

Ripper v. United States (8th Cir.), 178 Fed. 24, 26;

Schencks v. United States, 2 F. 2d 185, 186, 187.

The evidence before the Judge or Commissioner who issues the search warrant must be such as would be admissible on trial.

Wagner v. United States (8th Cir.), 8 F. 2d 581, 583;

Giles v. United States (1st Cir.), 284 Fed. 208, 214.

The Commissoner must be furnished with facts—not observations, beliefs or surmises.

Veeder v. United States (7th Cir.), 252 Fed. 414, 418.

When the validity of a warrant was before the Court of Appeals for the First Circuit in *Giles v. United States,* 284 Fed. 208, the Court said that the affidavit should have affirmatively appeared that the affiant had personal knowledge of facts competent for a jury to consider, and the facts, and not his conclusion from the facts, should have been before the Commissioner.

Lockname v. United States (9th Cir.), 2 F. 2d 427, 428;

Kohler v. United States (9th Cir.), 9 F. 2d 23, 25.

A search warrant could issue only upon evidence which could be competent in a trial before a jury and of such a nature to lead a man of prudence and caution to believe that the offense had been committed.

Grau v. United States, 287 U. S. 124, 128.

Sworn general statements set forth in the affidavit are not sufficient to warrant a judicial finding of probable cause for the issuance of a search warrant, and therefore the warrant is void.

United States v. Lassoff, 147 Fed. Supp. 944, 949.

There is no conflict between these authorities and the *Brinegar* case, as far as the law itself is concerned. It is the facts that must be considered.

B. The Prosecution Was Bound by Its Evidence of Defendant's Conversation.

The Court, in affirming the conviction, makes no comment on petitioner's contention that where the prosecution presents as part of its case a defendant's statement, the prosecution is bound by that evidence in absence of proof to the contrary.

People v. Coppla, 100 Cal. App. 2d 766, 769, 224 P. 2d 828;

People v. Griego, 136 Cal. App. 2d 51, 56, 288 P. 2d 175.

The Government saw fit to introduce evidence of a conversation with the appellant that when the appellant was asked what he was doing with the papers he replied that he was just figuring the wins and losses and that he did not need a stamp because he was not a bookmaker. [Tr. of Rec., p. 45.]

This evidence, which binds the prosecution, negates the contention of the prosecution that the acts of the appellant were done wilfully and knowingly. In the absence of a showing that the defendant had knowledge that he was required to register, the conviction must fall.

II.

The Evidence Does Not Support the Conviction.

A. The Prosecution Did Not Establish That Defendant Was Required to Register and Pay a Wagering Occupational Tax.

The Court in its opinion affirming the conviction (p. 9) states:

> "There was before the Court a great mass of evidence of repeated transactions of appellant personally receiving from one or more persons at the North

> Burris apartment in Compton, which apartment was not appellant's residence, and of his making up or using betting markers, scratch sheets and owe sheets, and of determining the amounts of wins and losses, thus furnishing indispensable final information to him or his agent for use in final pay offs."

It is apparent that there must be some confusion or misunderstanding of the facts of the instant case. There is absolutely no evidence whatsoever of the appellant personally receiving from one or more persons at the North Burris apartment in Compton any transactions. No bets of any kind were received at the North Burris Apartment. Nothing was received by the appellant at the North Burris apartment.

In view of this obvious misstatement of facts in the Court's Opinion, a rehearing should be granted so that the decision of the Court can be based on the evidence and the facts presented.

The Court in its Opinion (p. 9) jumps to a conclusion that "determining the amounts of wins and losses" furnishes indispensable final information to the appellant or his agent for use in final pay offs. However, the uncontroverted evidence is that the appellant was figuring the wins and losses and that Swede would come around and pick them up. [Tr. of Rec., p. 45.] Therefore, the computations were not being made for the appellant or his agent, but for the appellant's superior.

Under the case of *United States v. Calamaro,* 354 U. S. 351, a pick-up man is not required to register and pay an occupational tax.

The *Calamaro* case, on pages 355 and 357 of the decision, holds that Congress did not choose to subject all employees of gambling enterprises to the tax and reporting

requirements, but was content to impose them on persons actually "engaged in receiving wagers"; and that the occupational tax does not apply to a pick-up man.

B. There Was No Showing of "Wilfully and Knowingly."

It is significant that the prosecution saw fit to charge the appellant with wilfully and knowingly failing to register and to pay the tax, in violation of Section 7203, Title 26, United States Code. [Tr. of Rec., pp. 3-4.]

It did not charge him with violating Section 7262, Title 26, United States Code, which eliminates the requirement that the acts be done wilfully.

Since the appellant did not know he needed a stamp, because he believed he was not a bookmaker, the evidence falls short of establishing that the acts were done wilfully and knowingly, as charged in the Information.

C. Venue Was Not Established.

The Court in its Opinion (p. 9) holds that the Court can take judicial knowledge that Compton is within the Central Division of the Southern District of California. With this appellant does not quarrel.

Appellant's contention is that the prosecution failed to produce evidence to show that the appellant engaged in the business of accepting wagers within the Central Division of the Southern District of California.

In short, there is no evidence that shows appellant accepted wagers. The evidence merely shows that he picked up slips of paper in an auto park and worked with these papers in an apartment in Compton. The appellant was found in possession of papers which in the opinion of prosecution witnesses constituted betting markers, but this did not establish that the wagers themselves were received

within the Central Division of the Southern District of California, nor does this evidence show that appellant was engaged in the business of accepting wagers within the geographical area involved.

Request for Hearing En Banc.

Because there is an apparent conflict in the decision of this Court with those of other Circuit Courts of the United States and the Supreme Court of the United States, it is respectfully requested and suggested that this case be heard *en banc*.

Dated: February 20, 1959.

Respectfully submitted,

MURRAY M. CHOTINER and
RUSSELL E. PARSONS,
By MURRAY M. CHOTINER,
Attorneys for Appellant Charles H. Rutherford.

Certificate of Counsel.

Murray M. Chotiner, one of counsel for Charles H. Rutherford, does hereby certify that in his judgment the Petition for Rehearing is well founded and is not interposed for delay.

MURRAY M. CHOTINER.